No. 98-56727

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.
and ALLIANCE OF ARTISTS AND RECORDING COMPANIES,

Plaintiffs-Appellants,

v.

DIAMOND MULTIMEDIA SYSTEMS, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Central District of California in CV 98-8247 ABC (RZx)

BRIEF OF THE CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE AND AFFIRMANCE OF THE JUDGMENT BELOW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* Consumer Electronics Manufacturers Association (CEMA) states that it is an unincorporated sector of the Electronic Industries Alliance (EIA), a not-for-profit corporation. EIA does not have any parent corporation and no publicly held company owns 10% or more of its stock.

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BRIEF OF THE CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE AND AFFIRMANCE OF THE JUDGMENT BELOW

INTEREST OF THE *AMICUS*

The Consumer Electronics Manufacturers Association ("CEMA") is the trade association that represents more than 500 U.S. manufacturers of audio, video, mobile electronics, communication, information and multimedia products and accessories sold to consumers, including home recording devices of all types. CEMA is a sector of the 74-year old Electronic Industries Alliance (EIA). Its members are vitally interested in all laws affecting home recording devices or the right of consumers to use them.

On behalf of its members and the consumers who use their machines, CEMA was one of the three organizations at the center of the extensive negotiations that led to the Audio Home Recording Act of 1992 ("AHRA"), 17 U.S.C. §§ 1001 - 1010. *See* District Court's Opinion (slip op. at 10); S. Rep. No. 102-294, 102d Cong., 2d Sess. 32-33 & n. 16 (the "Senate Report" or "S. Rep."); H.R. Rep. No. 102-873 Pt. 1, 102d Cong., 2d. Sess. 10 (Judiciary Committee)(the "House Report" or "H.R. Rep."). Thus, CEMA has specialized knowledge of AHRA that may be of assistance to the Court and a fundamental interest in

assuring that the compromises it negotiated are preserved. CEMA's interests are not represented by any of the parties, none of whom are CEMA members.

Appellant RIAA was another participant in the negotiations.[1] Regrettably, the statute described in RIAA's brief bears little resemblance to the Act negotiated by the parties and enacted by Congress. RIAA's brief:

- Incorrectly maintains that the Act imposes an obligation on digital audio recording devices to prohibit serial copying; in fact, the Act requires only that such devices implement a defined system, the Serial Copy Management System ("SCMS") or its functional equivalent;
- Erroneously dismisses SCMS, the key technical element of the compromise, as a system applicable only to "a number of identified devices existing at the time of the enactment of the AHRA;" to the contrary, SCMS is a carefully-negotiated, generally-applicable set of functional requirements that fully satisfy any digital audio recording device's compliance obligation under AHRA section 1002(a); and
- Thereafter wholly ignores SCMS and fails to inform the Court that the two types of copies of which it complains, copies of MP3 files and copies transferred from CDs via a computer hard drive, are permitted by SCMS.

The district court correctly found (at 16-17), and RIAA does not seriously contest, that a Rio with SCMS would both comply with AHRA and be functionally the same as a Rio without SCMS as to the copying of concern to

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[1] Appellant AARC is an organization formed by RIAA and affiliated with RIAA that administers the distribution to record companies and performing artists of royalty payments received under the AHRA. For simplicity, we refer to appellants herein as RIAA.

RIAA. In short, RIAA's claimed injury is not caused by the asserted violation of the AHRA, and it thus cannot obtain a preliminary injunction. Further, RIAA's claim that the court must presume irreparable injury from a violation of AHRA is contrary to the statutory text and settled canons of statutory construction. RIAA's approach would unwisely constrain the discretion of the federal courts in addressing complex new issues under AHRA as they pertain to potentially beneficial new technologies.

AHRA obligates CEMA's members to design and manufacture recording devices in compliance with the Act. Thus, the correct interpretation of the Act is of the utmost importance to CEMA. RIAA's multiple misconstructions of AHRA would significantly disadvantage consumers and impose undefinable burdens on CEMA's members. CEMA offers this brief to assist the Court in the proper construction of the AHRA.[2]

A motion for leave to file this brief accompanies the brief.

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[2] The other arguments presented by the parties are unnecessary for this Court to affirm the denial of a preliminary injunction. Accordingly, CEMA takes no position on such issues as whether the Rio is, in fact, a "digital audio recording device," or whether the District Court properly construed the procedures applicable to the Secretary of Commerce under AHRA section 1002(a)(3).

ISSUES PRESENTED

1. Does a digital audio recording device that satisfies the functional requirements of SCMS comply with the technical requirements of AHRA?

2. Does SCMS (and therefore, AHRA) permit the two types of copies made by the Rio that RIAA claims causes it irreparable injury—copies of MP3 files from the Internet and copies made by consumers of their own CDs via a computer hard drive?

3. Where RIAA's same claimed injury would occur if Rio complied with SCMS, is RIAA's injury caused by a violation of AHRA?

4. Should a court apply traditional equitable principles to require proof of actual irreparable injury, rather than presuming irreparable injury, under AHRA's carefully negotiated, new statutory regime that authorizes consumer copying of digital musical recordings, provides statutory royalties to copyright owners, and gives the courts full discretion to grant or deny injunctive relief to "interested copyright parties"?

ARGUMENT

I. THE AHRA IS A CAREFULLY NEGOTIATED COMPROMISE THAT ENSURES CONSUMERS HAVE THE ABILITY TO MAKE HOME AUDIO RECORDINGS AND MANUFACTURERS HAVE THE RIGHT TO MAKE RECORDING DEVICES AS LONG AS THOSE DEVICES COMPLY WITH THE FUNCTIONAL REQUIREMENTS OF SCMS.

The AHRA compromise was carefully negotiated under congressional committee oversight and then enacted by Congress into law. The language of such a compromise statute has great weight since it embodies the agreement reached. The understanding is (to paraphrase Dr. Seuss's Horton) that Congress "meant what it said and said what it meant." *See United States v. Sisson*, 399 U.S. 267, 291 (1970) (the "compromise origins" of an act "justify the principle of strict construction"); *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 617 (1981) (where a legislative compromise has occurred "the wisest course is to adhere closely to what Congress has written").

A. AHRA Is a Compromise Among Parties Directly Interested in Home Copying of Musical Recordings.

The AHRA arose out of a long-standing dispute over the rights of consumers to engage in the home recording of music. The consumer electronics industry maintained that such home recording for noncommercial purposes was lawful fair use. *See* 17 U.S.C. § 107; *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)(certain home video recording is fair use). The recording and

music industries maintained that such copying infringed the copyright owners' exclusive rights under the Copyright Act, 17 U.S.C. § 106.

The advent of digital recording devices exacerbated the concerns of copyright owners and led to negotiations between the recording and consumer electronics industries. *See* S. Rep. 32. In the course of those negotiations, manufacturers of digital audio recording devices developed SCMS, a comprehensive system for controlling copying using a simple set of codes. SCMS, when implemented, permits consumers to make first generation copies of music recordings while constraining their ability to make direct digital copies from those copies. *Id.* 32, 36-37; H.R. Rep. 9-10. An attempt to enact legislation mandating SCMS in certain devices was blocked by the music publishing industry, which insisted that, in addition to requiring technical limits on consumer digital audio recording, copyright owners also be compensated. S. Rep. 32; H.R. Rep. 10.

Congress encouraged the consumer electronics, recording, and music industries to negotiate. Their comprehensive agreement was embodied in bills introduced in 1991, S.1623 and H.R.3204. S. Rep. 32-33; H.R. Rep. 10. The parties' agreement was detailed in the Senate Report, which included a "Technical

Reference Document" (TRD) defining the breakthrough SCMS technology.[3] S. Rep. 17-30. Significantly, the personal computer industry was not a central participant, and the parties carefully drafted the compromise to avoid rousing that sleeping giant.

In 1992 Congress ratified the compromise, enacting AHRA. The House Judiciary Committee streamlined the negotiated text, but "preserve[d] the essentials of the agreement." H.R. Rep. at 13. As RIAA's brief states, AHRA "is not a codification of common law or a restatement of preexisting obligations. *It is*

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[3] As defined in the TRD, the primary functions of SCMS use two simple codes. The first indicates whether SCMS is being invoked to "assert" copy protection for a copyrighted work. The second indicates the "generation status" of the source data, *i.e.*, whether it is an "original" or a "copy." SCMS has three relevant "states"---protection asserted, generation "original"; protection asserted, generation "copy"; and protection not asserted (generation irrelevant). S. Rep. 23-24 (¶(A)(1)). When digital audio data marked with these codes are input into a "digital audio recording device" the device must react in prescribed ways. A source marked "SCMS protection not asserted" may be freely copied, with the copies bearing the same marking. A source marked "protection asserted, original" may also be copied, with the copies marked "protection asserted, copy." A source marked "protection asserted, copy" may not be copied. S. Rep. 24 (¶(A)(4)). SCMS also provides a rule for unmarked sources such as Internet MP3 sites. Data from such sources may be copied and the *copies* are to be marked "protection asserted, original." *See* Part II.B., *infra*. A computer, though it is able to record data from a CD or an MP3 site is not a "digital audio recording device." Accordingly, it is under no obligation to read or respond to SCMS. Further, SCMS regulates "serial copying" not multiple copying. The source's marking is not changed, and it may be copied repeatedly.

a new, comprehensive statutory scheme enacted to balance conflicting interests." (RIAA Br. 28, emphasis added).

B. The Terms of the Act Protect Consumer Home Recording and Clearly Define the Obligations of Manufacturers of Digital Audio Recording Devices.

The AHRA compromise benefited all concerned. The Act flatly rejects the notion that copyright owners should have the power to forbid consumer copying of musical recordings, either directly or by denying access to copying technology. Section 1008 provides that:

> No action may be brought . . . alleging infringement of copyright based on the manufacture, importation, or distribution of a digital [or analog] audio recording device [or] medium, . . . or based on the noncommercial use by a consumer of such a device for making digital [or analog] musical recordings.

This section effectuates "a key purpose" of the Act "to insure the right of consumers to make analog or digital audio recordings of copyrighted music for private, noncommercial use." S. Rep. 51. Regardless of the desires of the copyright owner, a consumer now may use a digital audio recording device to copy music "for use in his or her home, car, *or portable tape player*, or for a family member." *Id.* (emphasis added). Manufacturers may develop and sell digital audio recording devices to facilitate such copying without facing suit for contributory infringement. AHRA § 1008.

In exchange, AHRA gives copyright owners a financial return for home copying in the form of statutory royalties assessed against each "digital audio recording device" and "digital audio recording medium." AHRA §§ 1004-06. In addition, section 1002(a) mandates that each "digital audio recording device" or "digital audio interface device" constrain "serial copying" of "digital musical recordings" in one of three ways. Two of the three available approaches are implementation of SCMS or a system with "the same functional characteristics" as SCMS." AHRA § 1002(a)(1) & (a)(2); see Part I.C., *infra*.

The AHRA carefully defines a "digital audio recording device" as any machine or device that has "the primary purpose of, and that is capable of, making a digital audio copied recording for private use." AHRA § 1001(3). A "digital audio interface device" is a machine or device "designed specifically to communicate digital audio information and related interface data to a digital audio recording device." AHRA § 1001(2). Because personal computers and their hard drives are not primarily designed and marketed for the specified purposes, they are not digital audio recording devices or digital audio interface devices.

"Serial copying" is defined as the "duplication in a digital format" of a sound recording, from a digital reproduction of a "digital musical recording." The term "digital musical recording" is in turn defined as "a material object" in which

are fixed "only sounds and material, statements, or instructions incidental" thereto. AHRA § 1001(5). Thus, copying a digital musical recording is not serial copying. Instead, the copying must reach the second generation.

C. Contrary to RIAA's Repeated Assertions, Section 1002(a) Only Requires Digital Audio Recording Devices To Implement SCMS or its Functional Equivalent; It Does Not Require them To Prohibit Serial Copies

As the trial court correctly ruled (at 15), AHRA does not forbid serial copying. Instead, section 1002(a) requires that each digital audio recording or interface device conform to a system that allows for the limitation of serial copying. The Act grants the manufacturer of such devices three distinct options. *Id.* The manufacturer fully satisfies this obligation if it implements SCMS or its functional equivalent. AHRA § 1002(a)(1) & (a)(2). Computers are not digital audio recording devices and, therefore, are not required to implement SCMS or otherwise control serial copying.

RIAA's central legal fallacy is its oft-repeated premise that section 1002(a) requires digital audio recording devices "to prohibit unauthorized serial copying." Brief at 28, *see also* 22, 23, 31, 36, 42. To make this argument, RIAA simply ignores the first two options in section 1002(a) that are based on SCMS and focuses only on the third option, section 1002(a)(3), which permits the Secretary of Commerce to certify non-SCMS systems.

But as much as RIAA would like to ignore SCMS and argue that all serial copying must be prohibited, that is not the deal RIAA made or the requirement Congress enacted. Any digital audio recording device that meets the functional requirements of SCMS complies with section 1002(a). Further, as we now show, SCMS does not prohibit all serial copying. Indeed, the very copying that RIAA asserts causes its "irreparable injury" in this case is permitted by SCMS.

II. UNDER THE SCMS SYSTEM MANDATED BY AHRA, THE RIO IS PERMITTED TO MAKE THE VERY COPIES THAT RIAA COMPLAINS CAUSES ITS IRREPARABLE INJURY.

A. RIAA Mischaracterizes SCMS as a System of Limited Applicability, Rather than a Cornerstone of the Compromise Embodied in AHRA.

RIAA (at 6-7) slights SCMS as a specific technical system applicable only to "a number of identified devices existing at the time of the enactment of the AHRA." This is the second major fallacy of law in RIAA's argument.

While SCMS is not expressly defined in the final text of the Act, it is clearly identified in AHRA's legislative history and the meaning of the term is well understood.[4] SCMS was identified in section 1001(13) of the bills introduced in

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[4] CEMA therefore disagrees with Diamond Multimedia (Brief at 46-48) that AHRA is "void for vagueness." Further, the Court should not pass on the Constitutionality of AHRA on this preliminary record, particularly where there is an alternate ground for affirming denial of the preliminary injunction. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Construct. Trades*

(Continued...)

1991 as the system set forth in great detail in the "Technical Reference Document." *E.g.*, S. Rep. 4. That document was incorporated into both the Senate Report (at 17-30) and the House Energy and Commerce Committee Report, H.R. Rep. 102-780 Pt. 1, 102d Cong., 2d Sess. 32-50.

As set forth in the bills reflecting the compromise agreement of CEMA, RIAA and the music industry, a digital audio recording device other than a DAT recorder (a particular type of digital audio recording device already in existence) complied with SCMS by complying with the "functional characteristics" of SCMS. *See e.g.*, S.1623, § 1021(a)(1)(C), S. Rep. 11. The Senate Report made clear that "[s]uch functional characteristics are set forth in parts I-A and II-A of the technical reference document." S. Rep. 65; *see id.* 17 (TRD Introduction). The Report further stated that parts I-A (applicable to "interface devices," which are devices that communicate digital audio data to recording devices) and II-A (applicable to "digital audio recording devices") "are intended to lay out broad rules for SCMS so that SCMS can be implemented in different ways and the

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(...Continued)
Council, 485 U.S. 568, 575 (1988). CEMA expects it will seek leave to participate in any further consideration of the Constitutional challenges raised by Diamond.

development and introduction of new digital audio technologies will not be hindered." S. Rep. 66.

Contrary to RIAA's statement that SCMS only applied to then-existing devices, the TRD itself expressly addressed the applicability of SCMS to future devices. The introduction to part II-A states: "To implement the functional characteristics of SCMS in DAR devices, whether presently known *or developed in the future*, the following conditions must be observed." S. Rep. 23 (emphasis added). Other parts of the Technical Reference Document set forth detailed mandatory implementations of SCMS for use in the "existing devices" dismissively referenced by RIAA. *Id.; see id.* 17 (TRD Introduction). Those other parts did not apply to the Rio.

The House amendments to the Act did not change the general applicability of SCMS. If anything, they reaffirmed it. The House made clear that it "preserve[d] the essentials of the agreement" of the parties. H.R. Rep. 13. Further, while the House Judiciary Committee objected to certain narrative statements of policy in the Technical Reference Document and to the incorporation into law of its detailed specifications, the Committee's Report expressly states (H.R. Rep. 14) that the final Act intended SCMS to refer to the broader "functional and technical characteristics as set forth in the Technical

Reference Document." These are precisely the "functional characteristics" that the Senate Report explains are contained in parts I-A and II-A of the document and that formed the core of the CEMA/RIAA agreement.[3] It is critical not to characterize SCMS in a way that would exclude or unduly hamper new technology.

B. Use of the Rio To Copy MP3 Digital Musical Files and Compact Discs Is Contemplated by and Fully Consistent with SCMS.

The portion of RIAA's Brief that (at 9-12) addresses "The Injury Threatened by Introduction of the Rio Device" focuses on "the proliferation of MP3 files over the Internet." In arguing that the Rio is subject to and violates AHRA, RIAA's Brief also complains (at 15) that a Rio can be used to make a portable copy of a compact disc in one's possession. What RIAA's Brief overlooks is that both forms of copying are contemplated and permitted by SCMS and could be performed by a Rio with SCMS.

RIAA does not deny that a Rio with SCMS would copy both Internet MP3 files and compact discs or that, so far as its practical interests are concerned, a Rio with SCMS is no different from one without SCMS. To the contrary, RIAA's

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[3] Just as section 1002(a)(1) focuses on the functional characteristics set forth in parts I-A and II-A of the TRD, compliance with section 1002(a)(2) is predicated on compliance with the "functional characteristics" of SCMS.

Brief acknowledges (at 36), but does not contest, the trial judge's finding that "'incorporating SCMS into the Rio device appears an exercise in futility' because a Rio 'without SCMS is functionally equivalent to a Rio with SCMS.'" RIAA's Brief asserts (at 36) that this conclusion "misses the point," but in fact it goes precisely to RIAA's claim for injunctive relief – the issue here.

1. SCMS Permits the Rio To Copy MP3 Files Distributed over the Internet.

When SCMS was being negotiated, those involved recognized that consumers would encounter digital music data that lacked SCMS information. One theoretical option would have been for SCMS to refuse to copy such data. That option, however, would have blocked a great deal of lawful use and simply was not acceptable to those for whom home copying was important. The compromise struck was to structure SCMS to allow such data to be copied, but to assure that the copying would not serve as a link in a lengthy chain. Thus the Technical Reference Document provides (Part II-A, ¶ 10, S. Rep. 24) that:

> digital audio signals that are capable of being recorded by a [digital audio recording] device but that have no information concerning copyright and/or generation status shall be recorded by the DAR device so that the digital copy is copyright asserted and original generation status.

In short, *SCMS explicitly permits home copying on a digital audio recording device of an MP3 Internet file that has no SCMS information*: such a

file "shall be recorded." *Id.* What SCMS requires is that the copy made by the digital audio recording device be treated as an "original" generation copy in which SCMS protection is invoked. This deemed SCMS status permits the copy made by the digital audio recording device itself to be recopied. Even if this were deemed "serial copying" -- which is not how the SCMS rules perceive it -- it still is permitted by SCMS and thus is lawful under AHRA.

The Rio's design allows even less copying of Internet MP3 files than SCMS would permit. Although SCMS would allow further copying of a digital music recording made by Rio from an Internet MP3 file, Rio's lack of a digital output prevents any such copying. Thus, including SCMS in a Rio would cause it to record a "permission to copy" that Rio's hardware prevents being used. It would be a hall pass written in invisible ink during summer vacation.

That MP3 files are transmitted to a Rio through a computer that makes a digital music file on its hard drive does not change this conclusion. *Computers and the contents of their hard drives simply are not subject to AHRA and are not required to implement SCMS.* If posting MP3 files on the Internet violates traditional copyright law, that is a matter for another lawsuit against other defendants based on infringement principles.

2. SCMS also Permits the Rio To Copy a CD that Includes SCMS Information.

Similarly, a Rio containing SCMS could copy a CD downloaded directly into a home computer. As has been noted above, a basic purpose of AHRA was to confirm and facilitate the ability of consumers lawfully to make high quality home musical recordings. In particular, AHRA sought to protect noncommercial home copying of digital musical recordings, such as compact discs. RIAA's Brief obscures, but does not deny this point.

CEMA understands that software distributed with the Rio permits the copying of music from a CD onto a computer's hard drive. Neither that software, nor the hard drive, meet the AHRA definition of "digital audio recording device," so they have no obligation to change the SCMS coding of the copy on the hard drive to indicate that a first generation copy has been made. Thus, a Rio containing SCMS would read the file on the hard drive as having "original" status (just like the CD) and would be entitled to make a copy that would be encoded as a first generation copy. SCMS would prevent a digital audio recording device from making a digital copy from the Rio, a result assured by the Rio's lack of a digital output.

RIAA objects that "ripper" software creates a digital copy on the computer hard drive in addition to the digital recording on the Rio. But that is irrelevant to

this AHRA action. Computers simply are not "digital audio recording devices," so they need not implement SCMS. That decision was made when AHRA was negotiated, and RIAA does not dispute it.

If RIAA wants to challenge the sale of computers or software used to create MP3 files, it will have to do so under traditional copyright principles, not under AHRA. Where the device or software has substantial non-infringing uses, such a lawsuit will be difficult. *See, e.g., Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Be that as it may, this case asserts no such copyright claim. Instead, as RIAA's Brief stresses (at 27): "The plaintiffs pleaded one claim in this case – that the . . . Rio device . . . violates the Audio Home Recording Act." This is not a case about the creation of files on a computer.

In short, whether or not the Rio conforms to AHRA's technical requirements for inclusion of SCMS or equivalent technology, the Rio copies of which RIAA complains are fully consistent with SCMS and would occur if the Rio implemented SCMS. This has profound consequence for RIAA's claim for interim relief and its standing, as we now show.

III. BECAUSE RIAA'S CLAIMED INJURY IS NOT CAUSED BY ANY ALLEGED VIOLATION OF AHRA, RIAA LACKS BOTH ANY BASIS FOR PRELIMINARY RELIEF AND STANDING.

To prevail on this appeal, RIAA must show both that the claimed violation of AHRA by the Rio – its lack of SCMS – caused it actual injury and that injury is irreparable. Otherwise, RIAA fails to meet a requirement that is essential for both preliminary injunctive relief and standing under AHRA section 1009(a).

It is undisputed that preliminary injunction law requires proof that RIAA's injury is caused by the claimed violation. The trial court said (at 18), and RIAA's Brief does not dispute, that:

> Plaintiffs acknowledge that, for purposes of preliminary injunction, the irreparable injury "must be *caused* by the alleged wrongful conduct." *Stanley v. University of So. California*, 13 F.3d 1313, 1326-25 (9th Cir. 1994) (emphasis added) (cited in Plaintiffs' Reply at 19:26-28).

It is equally clear that injury caused by a violation also is essential to RIAA's standing. RIAA claims "standing" under section 1009. That section confers standing to seek an injunction on any "interested copyright party injured by a violation of section 1002 or 1003."[*] While RIAA appears to be an "interested

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[*] Standing to seek an injunction is granted by section 1009(a) and is limited to interested copyright parties who have been injured by a violation.

copyright party" under section 1001(7), that is not enough. RIAA *also* must show that it was "injured by a violation" of sections 1002 or 1003.

RIAA makes no showing to support injunctive relief or standing. It claims that the Rio will injure its members, but it does not show that injury is caused by the way in which Rio allegedly violates AHRA. Indeed, RIAA's Brief proclaims (at 41) that "the issue is not what causes the harmful uses of a noncompliant product, but rather the injury that plaintiffs would suffer as a result of the noncompliant product's unrestrained distribution." Nonsense. If a complying product would affect a plaintiff in the same way as a noncompliant product, the plaintiff is not injured by the violation.[7]

The injury RIAA relies upon to demand a preliminary injunction is described at pages 9-10 of its Brief. That injury rests on RIAA's premise that the prevalence of MP3 files currently is "bounded by a natural limitation: MP3 files can be played only by computers." RIAA claims (at 10) that the Rio "will change

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[7] RIAA's argument calls to mind the discredited notion that a car that lacks a required tax stamp or tag is a "trespasser on the highway" and is responsible for whatever injury occurs during its illicit presence there. Under RIAA's understanding of "caused by a violation," if a vehicle were sold in violation of a statute requiring emission control devices, a person who walked into the vehicle's open door could bring suit claiming to have been injured by the violation – after all, if the vehicle had not been sold, it would not have been parked where it was.

that by making MP3 files more portable." This portability, RIAA asserts (at 11, 43), will encourage a "proliferation" of unauthorized MP3 files.

Of course, *portability is fully consistent with SCMS and is not a violation of the AHRA*. Indeed, one of the explicit purposes of AHRA was to enhance consumer convenience by allowing recording in a "portable" format. S. Rep. 51. RIAA neither contends nor proves that the portability of the Rio depends upon the absence of SCMS technology. To the contrary, RIAA's Brief quotes (at 18) and does not contest the trial judge's findings that *"a Rio without SCMS is functionally equivalent to a Rio with SCMS," and "a Rio with SCMS would not violate Section 1002"* (emphasis added). Thus, injury due to portability is not injury due to a violation of AHRA. In short, RIAA has failed to make a showing that is essential to preliminary relief. It also has failed to establish its entitlement to standing.

IV. MOREOVER, RIAA IS MISTAKEN IN ITS CLAIM THAT AHRA REQUIRES ITS INJURY TO BE DEEMED IRREPARABLE AS A MATTER OF LAW.

Even if Rio's claimed violation actually caused injury to RIAA, that would not justify a preliminary injunction. RIAA also would have to prove that injury is irreparable and outweighs the injury to the defendant. The trial court held that RIAA failed to carry this burden. While RIAA's Brief claims (at 41-43) that RIAA offered substantial evidence on this issue, its primary argument (at 37-40) is

that a violation of AHRA (or at least one affecting copyright interests) must be deemed to cause irreparable injury as a matter of law. Not so.

Under federal equitable practice, "the bases for injunctive relief are irreparable injury and inadequacy of legal remedies." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987). Congress "may intervene and guide or control the exercise" of equity practice, but courts "do not lightly assume that Congress has intended to depart from established [equitable] principles." *Id.*; *Hecht Co. v. Bowles*, 321 U.S. 321 (1944).

In particular, establishing a presumption that a violation causes irreparable injury "is contrary to traditional equitable principles." *Amoco*, 480 U.S. at 545 (reversing this Court's presumption of irreparable injury and direction of injunction). The modern Supreme Court has been hostile to such presumptions, rejecting them except where the underlying statute clearly shows that Congress intended to mandate otherwise. *See, e.g., Hecht Co.*, 321 U.S. at 329 (Rejecting claim that injunction was mandatory on ground that "if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made."); *Amoco*, 480 U.S. at 543 & n.9 (distinguishing *TVA v. Hill*, 437 U.S. 153 (1978) on the ground that the statute clearly limited the discretion of the District Court).

This Court follows the majority in holding that proof of *copyright infringement* creates a presumption of irreparable injury. *See, e.g., Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1335 (9th Cir. 1995). The roots of this doctrine are uncertain and it never has been adopted by the Supreme Court.[8] Whatever its validity in the case of infringement actions, there is no basis for extending that doctrine to AHRA.

Congress and the parties who negotiated AHRA were well aware that compromise legislation means what it says and no more. They also had fair notice from the Supreme Court that legislation would not be read to excuse proof of irreparable injury unless that intent was stated clearly. The agreed text includes no

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[8] The anomalous presumption that infringement is presumed to inflict irreparable injury has obscure roots. It appears to trace back to an English statute that compelled courts of equity to grant injunctions to copyright plaintiffs who proved infringement. Blocked by this statute from their customary practice of using a common law jury to make damage assessments, the equity courts concluded that the statute required them to assume damages. *See Tinsley v. Lacy*, 32 L.J.Ch. 535, 537 (1863). American courts cited out-of-context language from *Tinsley* to begin presuming damages, even though no statute mandated this. *See Reed v. Holliday*, 19 F. 325 (W.D. Pa. 1884). American courts then rationalized the result on various grounds, as the authorities cited by RIAA's Brief (at 38-40) reveal. An important thread was the notion that the essence of copyright was exclusive control over copying, a non-monetary right that only an injunction could fully implement. That rationale does not apply, of course, under AHRA, where the copyright owner's primary right is to receive monetary compensation in the form of a royalty. It is generally suspect, as most property rights are "exclusive."

such statement. To the contrary, AHRA establishes comprehensive new remedies for violation of the Act.[9] Section 1009 is clear that injunctive relief is to be discretionary: the court "may grant . . . injunctions on such terms as it deems reasonable." AHRA § 1009(c)(1). The House Report (at 24) confirms that section 1009(c) "permits, *but does not mandate*, the courts to issue temporary and permanent injunctions" (emphasis added). This cannot fairly be read to mean that the court must grant injunctions whenever a probable violation is established.[10]

Moreover, as is discussed above, AHRA establishes a comprehensive new regime for digital musical recordings that rests on different premises from traditional copyright law. For example, AHRA defines the interests of the copyright owner vis-a-vis consumer home recording primarily as an interest in

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[9] By contrast, Congress knows how to simply incorporate existing infringement remedies into new legislation when that is its intent. *See, e.g.* 17 U.S.C. §§ 106A & 501 (the "Visual Artists Rights Act," which expressly provides that violation of the rights conferred by section 106A(a) are subject to the same remedies as infringement).

[10] Significantly, this highly discretionary remedy is available only to "copyright interested parties;" others must sue for damages. AHRA § 1009(c). This suggests that Congress disfavored injunctive relief, but granted the courts discretion where violations are injuring copyright interests.

monetary payment—in sections 1004 to 1006 it provides for a royalty payment, and in section 1009 it provides a monetary remedy.[11]

More significantly, AHRA wrestles with a technological environment that did not exist when traditional copyright law took form. It imposes obligations -- such as the use of certain technology -- that are foreign to traditional copyright law. Such technology-based obligations require particularly careful consideration of the benefits and detriments of injunctive relief. A decision to mandate a technological burden that is not truly necessary, or an injunction that is unduly broad in scope, can unreasonably hobble the use and development of technology that is useful for lawful and beneficial as well as unlawful purposes.[12]

This Court should not add to AHRA a provision that Congress and the interested parties omitted and that federal equity practice disfavors. To the contrary, courts should retain maximum flexibility in addressing the new issues that burgeoning technology will raise under the new legal regime established by AHRA. Because RIAA was required to prove that its members would suffer

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[11] Thus, RIAA's argument (at 39) that the AHRA is premised on *exclusive* rights of the copyright owner is simply wrong. To the contrary, the AHRA starts from the premise that the copyright owner is not entitled *to exclude* noncommercial home copying.

[12] By contrast, a traditional copyright infringement injunction simply prohibits (Continued...)

injury that could not be compensated, and because the trial court acted in its discretion in concluding that RIAA's proof fell short, this appeal must fail.

CONCLUSION

The AHRA is intended to confirm and facilitate the ability of consumers lawfully to make noncommercial copies of digital musical recordings in convenient formats. The Rio permits just such copying. Whether or not its technology conforms to the precise requirements of AHRA, the copies that it makes are contemplated and permitted by AHRA and the SCMS system that AHRA adopts. Indeed, if the Rio incorporated SCMS, it would be allowed to make the same copies it does today, with the same effect on RIAA's interests. In this situation, RIAA's members simply are not injured by any possible technical noncompliance. Their lack of injury both forecloses any claim to injunctive relief and deprives them of standing. Similarly, there is no basis for finding that a violation of AHRA creates a presumption of irreparable injury. For each of these

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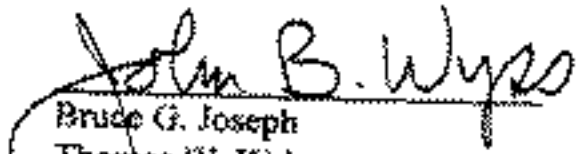
(...Continued)
infringement, an act that, itself, is unlawful.

reasons, the appeal should be denied and the order denying preliminary relief should be affirmed.

Respectfully submitted,



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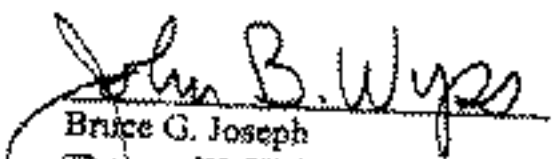
CERTIFICATION PURSUANT TO CIRCUIT RULE 32(e) AND FRAP 32(a)(7)(C)

Pursuant to Ninth Circuit Rule 32(c) and FRAP 32(a)(7)(C), I certify the foregoing brief *amicus curiae* is proportionally spaced, has a typeface of 14 points or more, and contains 5935 words.

Respectfully submitted,



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